IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.446 OF 2007
IN
NOTICE OF MOTION NO.820 OF 2007
IN
L.C. SUIT NO.846 OF 2007

1. Rajkumar Chauhan
2. P.V. Karunakaran
3. A.D. Khanjawadkar
4. Avinash G. Salkar
5. A.V. Balan
6. Sam Kutty Mammen
7. Ram Bali Sohi
8. C.A. Joseph
9. R.P. Sing
10. R.H. Sing
11. Mrs. Lata D. Sadhale
12. Chand S.C. Sing
13. Sarayu G. Hindlekar
14. Shailendra D. Jha
15. Ramchandra T. Patel
16. Rajkumar Shrivastav
17. Anandpratap N. Singh
18. Tressa John
19. Vijay Deshpande
20. Shabbir Ahmed
21. Satyawthi Menon
22. Anant A. Thakur
23. N.S. Pai
24. Devdas Bhaskar .. Appellants
(orig. Plaintiffs)

Versus

1. The Municipal Corporation of Gr. Mumbai
2. M/s. Arihant Enterprises,
Builders and Developers .. Respondents
(orig. Defendants)

Shri A.Y. Sakhare, Senior Counsel with Shri Chirag Shah i/b. Shri J.J. Shah, for the Appellants
Shri P.A. Purandare for the Respondent No.1
Shri L.H. Patil for the Respondent No.2

CORAM : S.R. SATHE,J.
DATED : 24/09/2007

ORAL ORDER :-

1. The Appellants-original Plaintiffs in L.C. Suit No.846 of 2007 have preferred this appeal against the order passed by the Judge, City Civil Court, Mumbai in Notice of Motion No.820 of 2007 whereby Plaintiffs' application for temporary injunction restraining them from carrying out any construction activities in pursuance of the sanctioned plan at Exh-G under flat CHE/5285/BP(WS)/AR on 24/06/2005 in the compound of Mona Apartment was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiffs are the flat purchasers of their respective flats in the building known as Mona Apartments. The defendant No.1 is Bombay Municipal Corporation. The defendant No.2 is the builder and developer from whom Plaintiffs have purchased their

respective flats in the Mona Apartment as per the provisions of Maharashtra Ownership Flats Act (hereafter called as the said Act) The defendant No.2 carried out the construction of a building and completion/ occupation certificate dated 02/07/2002 was also issued by the defendant No.1 to defendant No.2. Hence, Plaintiffs started residing in the said flats. As per the terms and conditions of the agreement with defendant No.2 he had promised to form and register a co-operative Housing society of the flats purchasers within 3 months from the date of issue of the occupation certificate. It is the grievance of the Plaintiffs that inspite of the completion of the said period of 3 months and the request made by the Plaintiffs, the defendant No.2 has not formed and registered the Co-operative Housing Society of the flats purchasers who have occupied the flats in Mona Apartments. The dispute with regard to registration of the said Society is presently pending before the Hon'ble Minister of Co-operative Society, State of Maharashtra.

3. According to Plaintiffs, the defendant No.2 was

not at all entitled to carry out any additions or alterations or construction on the suit plot. However, defendant No.2 submitted some proposal and plan to defendant No.1 for carrying out further construction on the suit plot without obtaining consent and permission from the Plaintiffs. Plaintiffs, therefore, even informed the defendant No.1 not to sanction any plan. However, defendant No.1 did not respond. Plaintiffs, therefore, obtained necessary information from defendant No.1 under the right to Information Act. Plaintiffs, thus came know that defendant No.2 has been permitted to carry out constructions of stilt and upper two floors adjoining to existing suit building. According to Plaintiffs, if such building is constructed light and air of the existing flat would be affected. It would also reduce the compulsory open space which is required to be maintained under the D.C. Rules. The proposed construction would also affect the parking facility of the Plaintiffs and would change the position of the open space reserved as recreation ground. Hence, Plaintiffs filed the present suit for declaration that the amended plan sanctioned by defendant No.1 on 24/06/2005 in respect of additional

wing to Mona Apartment is illegal, improper and against D.C. Rules and prayed for cancellation or revocation of the said sanctioned plan and for permanent injunction restraining defendant No.2 from carrying out any construction activities as per the plans sanctioned on 24/06/2005, in the compound of Mona Apartments.

4. On the same day Plaintiffs filed the above mentioned Notice of Motion and prayed for temporary injunction restraining defendant No.2 from carrying out any construction in the compound of Mona Apartment.

5. The defendant No.2 builder-developer filed affidavit in reply and opposed the Notice of Motion. The defendant No.2 contended that Plaintiffs are occupying their respective flats in Mona Apartment and it is only because of the non-compliance of certain things on the part Plaintiff's Co-operative Housing Society of the Plaintiffs has not been formed and for that purpose defendant No.2 can not be blamed. He further contended that as per clause-50 of the Purchase agreement executed by the Plaintiffs, it is clear that the defendant No.2 buider-promoter is authorized to

carry out the entire development on the suit plots and Plaintiffs have no right to obstruct the defendant No.2 in carrying out such development. According to defendant No.2, Plaintiffs are only trying to bring pressure on defendant No.2 and blackmailing him with a view that Co-operative Housing Society of Plaintiffs is registered at the earliest. He also contended that Plaintiffs have not made out any prima facie case and the balance of convenience is in his favour. He therefore prayed for the dismissal of the application.

6. After hearing the arguments of both the learned Advocates and considering the material documents produced by the parties, the learned Trial Judge came to the conclusion that Plaintiffs have failed to make out any prima facie case and to show that their rights are being infringed. According to him, defendant No.2 was carrying out the constructions as per the sanctioned plan. Hence, he dismissed the Notice of Motion filed by the Plaintiffs.

7. The above mentioned order is challenged by the Plaintiffs in this appeal. I have heard both the

learned Advocates at length. Shri A.Y. Sakhare, learned Senior Advocate for the Plaintiffs has urged two points. Firstly, he submitted that the learned Trial Judge has only relied on the judgement of the Supreme Court and dismissed the Plaintiffs' application. According to him, the learned Trial Judge has not at all pointed out how the ratio of the Supreme Court rulings is applicable to the facts of the case in hand. Secondly, he submitted that even as per the amended provisions of Section-7 of the said Act, in the instant case, it was necessary for the defendant No.2 to obtain consent of the Plaintiffs' flat purchasers for carrying out additional structure on the suit plot. He, therefore, submitted that if the temporary injunction is not granted. Plaintiffs' right will be affected. He, therefore, submitted that appeal be allowed and temporary injunction as prayed by the Plaintiffs be granted. As against this, learned Advocate for the defendant No.2 submitted that defendant No.2 is not carrying out any unauthorized illegal construction. He is constructing 'B' Wing as per the sanctioned plan. The Plaintiffs' rights are not likely to be affected by the construction of the said building and as such

Plaintiffs are not having any right to seek temporary injunction as prayed. Learned Advocate for the defendant submitted that the order passed by the learned Trial Judge is legal and correct. There is no reason to interfere with the same in the appeal. He, therefore, submitted that the appeal be dismissed.

8. It is not in dispute that the defendant No.2 is a builder, developer and he introduced a scheme to construct buildings on the suit plots and sale the same as per the provisions of Maharashtra Ownership Flats Act, 1963. It is also an admitted fact that the defendant No.2 obtained necessary sanction for the construction and accordingly, constructed 'A' Wing. There are 24 flats in the said wing and the same are occupied by the Plaintiffs. From the perusal of the record it is very clear that the Corporation has issued necessary completion certificate in respect of the said flats and the steps with regard to formation of the Co-operative Housing Society are being taken. However, at the same time, it is an admitted position that till today the Co-operative society of the Plaintiffs has not been actually formed and to that extent defendant

No.2 has not complied his obligation. However, the said matter is presently pending before the concerned authority. Much is made about the fact that the defendant No.2 has failed to discharge statutory obligation of forming Co-operative Housing Society within the period of 3 months from the issuance of completion certificate. However, we can not ignore the fact that the main point which is involved in the present suit is not with regard to formation of Co-operative Society. The main dispute is with regard to the additional structure which defendant No.2 intends to carry out on the suit plot. So, merely because the defendant No.2 has not taken necessary steps for formation of the Co-operative Housing Society of the Plaintiffs, it can not be said that Plaintiffs are entitled to get the temporary injunction as prayed for.

9. The grievance of Plaintiffs is that if the proposed construction is carried out that would affect the light and air of the Plaintiffs' flats. Besides this, there would be change of recreation place/ground and the construction would minimise the compulsory open space which is required to be maintained under D.C.

Rules. According to them, if the additional construction as proposed by the defendant is to be carried out then it can be done only with the consent of the present Plaintiffs. In order to show that Plaintiffs are having such right, the learned Senior Advocate for the Plaintiffs has placed reliance on the provisions of Section-7 and section 7A of the said Act.

> "7. ***After plans and specifications are disclosed no alterations or additions without consent of persons who have agreed to take the flats; and defects noticed within (three years) to be rectified.***
>
> ***(1) After the plans and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make-***
>
> ***(i) any alteration in the structures described therin in respect of the flat or flats which are agreed to be taken,***

without the previous consent of that person;

(ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building.

(2) Subject to sub-section (1), the building shall be constructed and completed in accordance with the plans and specifications aforesaid; and if any defect in the building or material used, or if any unauthorized change in the construction is brought to the notice of the promoter within a period of (three years) from the date of handing over possession, it shall whereever possible be rectified by the promoter without further charge to the persons who have agreed to take the flats, and in other cases such persons shall be entitled to receive

reasonable compensation for such defect or change. Where there is a dispute as regards any defect in the building or material used, or any unauthorized change in the construction, {or as to whether it is reasonably possible for the promoter to rectify any such defect or change, or as regards the amount of reasonable compensation payable in respect of any such defect or change which can not be, or is not, rectified by the promoter} the matter shall, on payment of such fee as may be prescribed, {and within a period of three years from the date of handing over possession, be referred for decision–

(i) in an urban agglomeration as defined in clause(n) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976, to such competent authority authorized by the State Government under clause(d) of section 2 of that Act, and

(ii) in any other area, to such Deputy Chief Engineer, or to such other officer of the rank equivalent to that of Superintending Engineer in the Maharashtra Service of Engineers, of a Board established under section 18 of the Maharashtra Housing and Area Development Act, 1976,

as the State Government may, by general or special order, specify in this behalf. Such competent authority, Deputy Chief Engineer or, as the case may be, the other officer of a Board shall, after inquiry, record his decision, which shall be final}"

"7A- Removal of doubt :-

For the removal of doubt, it is hereby declared that clause(ii) of sub-section (1) of Section-7 having been retrospectively substituted by clause (a)

of section 6 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment) Act, 1986 (hereinafter in this Section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause(ii) as so substituted had been in force at all material times; and the expressions "or construct any additional structures" in clause (ii) of sub-section (1) of section 7 as it existed before the commencement of the Amendment Act and the expressions "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorized change in the construction" in sub-section (2) of section 7 shall, notwithstanding anyting contained in this Act or in any agreement, or in any judgement, decree or order of any Court,

be deemed never to apply or to have applied in respect of the construction of any other additional buildings or structures constructed or to be constructed under a scheme or project of of development in the layout after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force.}"

10. Shri A.Y. Sakhare, Senior Counsel for the Appellants submitted that consent of the Plaintiffs' flat purchasers was necessary while obtaining sanction for the second structure i.e. 'B' wing. In order to substantiate his proposition, he has placed reliance on a case **Ravindra Mutenja and others V/s. Bhavan Corporation and others 2003 (5) Bombay Cases Reporter 695** wherein this Court (CORAM : F.I. REBELLO,J.) has made following observations.

" Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the Rules framed under MOFA is over, the permission of such purchasers would be required."

11. The above mentioned proposition is not disputed. However, the facts of the present case and the facts of the above cited ruling are different. In

the instant case, it was in fact first necessary for the Plaintiffs to place on record the lay out plan which was shown to them at the time of agreement and the terms and conditions of the agreement and then to place on record the sanctioned plan dated 24/06/2005 under which the defendant No.2 intends to carry out construction of 'B' Wing and thereby point out how there is deviation from the original sanctioned plan and how the new plan is in fact contrary to the original and affecting Plaintiffs' rights. However, Plaintiffs have not brought such specific material on record which would enable the Court to mark the difference between the initial lay out plan and the second sanctioned plan. On the contrary, it is the contention of the defendant No.2 that he is carrying out the construction as per the sanctioned plan. According to him, by clause-50 of the agreement he is in fact permitted to carry out such development. So, under such circumstance, it can not be said that Plaintiffs have made out a prima facie case showing that they are having particular rights in respect of the suit property and the said rights are being infringed by the defendant No.2.

12. Shri Patil, learned Advocate for the defendant No.2 has placed reliance on a case **M/s. Jayantilal Investments V/s. Madhuvihar Co-operative Housing Society reported in 2007(2) All MR 398** wherein the Apex Court has made the following grievance :-

> " ***From the reading of Section 7 and Section 7-A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any constitution of additional structures. However, the right to make any construction of additional structures/ buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional construction. This position is clear when one reads the amended Section 7 (1)(ii) with Section 7-A of the MOFA as amended. Therefore, having regard to the***

statement of objects and reasons for substitution of Section 7(1)(ii) by the Amendment Act, 36/86, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act No.36/86 was to change the basis of the judgement of the Bombay High Court in Kalpita Enclave case. By insertion of Section 7-A vide Maharashtra Amendment Act 36/86 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the

land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total lay out allows construction of more buildings, subject to compliance of the building rules or building bye laws or development control regulations."

13. From the above observations also it is very clear that it is not necessary to obtain the consent of the existing flat purchaser in each and every case. While considering the above observations, it is also necessary to note following other observations made by the Apex Court in the same ruling. It is mentioned :

"The Obligation of the promoter under MOFA to make true and full disclosure of the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7 (1)(ii) of MOFA."

14. It is also observed that at the time of execution of the agreement with the flat purchasers the promoter is required statutorily to place before the flat purchasers the entire project/scheme, be it of one building scheme or multiple buildings scheme.

15. So, having regard to the above observations of the Apex Court it is necessary to find out as to whether in the instant case, the Plaintiffs have prima facie shown that the defendant No.2 is deviating from the entire project/scheme which was placed before them while entering agreement with them. On the contrary, the learned Trial Judge has observed that the defendant No.2 has filed the lay out sanctioned plan in the year 1995. In that plan, buildings proposed were two wings i.e. 'A' wing and 'B' wing. He has also observed that proposed 'B' wing is not constructed on the recreation ground. So, when Plaintiffs have not made out a prima facie to show that the developer is causing change in the original plan or scheme and thereby carrying out additional construction which would minimise the substantial rights of the Plaintiff, they are not entitled to get temporary injunction as prayed. So,

when there is nothing on record to indicate that the defendant No.2 is trying to make additional new construction which was not shown in the original plan or scheme, it can not be said that the plaintiff has made out a prima facie case. Under the circumstances, I do not think that there is necessity to interfere with the discretionary order passed by the learned Trial Judge.

16. In this view of the matter, there is no substance in this appeal.

The appeal is dismissed with costs.

At this stage, the learned Advocate for the Appellant submits that the stay which was in operation till today be continued for further period of four weeks.

The learned Advocate for the Respondent objects for the same. With a view to give opportunity to the Appellant to challenge the order in the Higher Court, the stay granted earlier is to continue for four weeks hereafter.

(S.R.SATHE,J.)